

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.3464 OF 1988

Hargovindas Shivilal & Co. & Ors. ...Petitioners.
Vs.
Sri M.J. Chaudhari, Judge,
Small Causes Court at Bombay & Ors. ...Respondents.
....
Mr.Y. S. Jahagirdar, Sr. Advocate with Ms. Anita Castelino and Mr.
Narayan Waghela for the Petitioners.
Mr. Y.K. Tiwari for Respondent Nos.2, 4, 5 and 16.
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CORAM : DR.D.Y.CHANDRACHUD, J.

June 27, 2006.

ORAL JUDGMENT :

The Petitioners are Lessees of an open plot of land admeasuring 10700 sq.yards, situated at Vithalwadi, Nagoji Bhiku Marg, Village Ghatla, Chembur, Mumbai. On 1st June 1969, a Leave and Licence agreement was entered into between the Petitioner and Lok Seva Education Society, the Second Respondent, in respect of an area admeasuring 2080 sq.yards which was an open plot of land being Survey No.89, Hissa No.2. The case of the Second Respondent is that on the basis of the Leave and Licence agreement it erected four permanent

structures for a school building thereon. Another agreement was entered into on 1st November 1975 by which the Petitioners granted to the Second Respondent a lease in respect of land admeasuring 7762.21 sq.yards of Ghatla Village, Chembur for use as a play ground and for the construction of a building as mentioned in clause 9(c) of the agreement of lease. The total monthly rent agreed was 20 paise per sq.yard i.e. Rs. 1552.24. Due to a dispute between the Trustees, the society was unable to pay the rent. The Government of Maharashtra had also withheld grants-in-aid of the society. A suit for eviction was filed by the Petitioners against the Second Respondent and the Trustees in respect of the open plot of land admeasuring 7762 sq. yards covered by the lease agreement of 1st November 1975 on the ground of non-payment of rent. Prayer clause (a) of the suit was to the following effect:

“(a) The defendants be ordered and decreed to hand over quiet vacant and peaceful possession of the Plaintiffs plot of land admeasuring 7762.81 sq. yds. as per the said agreement dated 1.11.1975, along with the Buildings standing thereon.”

An ex-parte decree came to be passed on 2nd December 1986 by the Court of Small Causes directing the Second Respondent to hand over possession of the suit premises consisting of the plot of

land admeasuring 7762.81 sq.yards. The society took out Misc. Notice 232 of 1987 for setting aside the ex-parte decree. On 11th January 1988, the Court of Small Causes passed a conditional order to the effect that the ex-parte decree would stand set aside upon the Defendants depositing an amount of Rs.1,56,000/- calculated as arrears of rent upto December 1987 within a period of three months from the date of the order. Liberty was granted to the Respondent to at least deposit a reasonable amount within the stipulated period and to move the Court for extension of time. However, in default of compliance of the conditional order, the notice was to stand discharged. The operative order of the Court was to the following effect:

“On the defendants depositing Rs. 1,56,000/- calculated by way of arrears of rent upto December 1987 within three months from the date of this order this notice will stand as made absolute. Ex-parte decree dated 2.12.1986 will stand as set aside and in that event the suit should come on board of this court on 29.4.1988.

In case the defendants deposit a reasonable amount within stipulated period and make a request to this court for extension of time and satisfy this Court about their inability to deposit the whole amount within stipulated period, this court will consider the said request.

In absence of aforesaid requirements and satisfaction of this court, in case the defendants fail to deposit the aforesaid amount within stipulated period this notice will stand as discharged, and stay will stand as

vacated.”

Admittedly, the conditional order of the Court of Small Causes was not complied with. As a result, the notice for setting aside the ex-parte decree stood discharged and the decree attained finality. There is no dispute about the fact that the decree was executed thereafter.

2. The decree was thereafter set in execution and on 26th April 1988, the Petitioners executed the decree. Miscellaneous Notice 351 of 1988 was taken out before the Executing Court by one M.N. Kolwankar in his capacity as a Principal and Secretary of the Second Respondent in which it was alleged that in the process of executing the decree dated 2nd December 1986, the Petitioners had taken possession not only of the plot of land admeasuring 7762.21 sq.yards covered by the agreement of 1st November 1975, but also of the “other plot of 2080 sq.yards” which was the subject matter of the Leave and Licence agreement dated 1st June 1969 and upon which the society has erected certain structures. In other words, the grievance of the Society was that the execution was illegal and the Court had no right to deliver possession of property

which did not form part of the decree. There was also an averment to the effect that the Petitioners failed to bring on record the trustees who had been appointed by the Charity Commissioner and the decree was a nullity. The prayer before the Executing Court was that the execution be quashed and set aside and possession of the property which was taken over from the Second Respondent be redelivered by the Petitioners to the Second Respondent. Alternatively, the execution of the decree in respect of the plot of land admeasuring 2080 sq.yards which was the subject matter of the Leave and Licence agreement dated 1st June 2001 and which according to the judgment debtor was not the subject matter of the suit or the decree was sought to be set aside with consequential delivery of possession back to the society.

3. The dispute between the parties before the Executing Court centered around the question as to whether land admeasuring 2080 sq. yards which was covered by the Leave and Licence agreement dated 1st June 1969 formed part of the plot of land admeasuring 7762.21 sq. yards which was governed by the agreement dated 1st November 1975. According to the Petitioners, the land which formed the subject matter of the Leave and Licence

agreement dated 1st June 1969 was a part of the land which formed the subject matter of the subsequent agreement dated 1st November 1975 and therefore, the execution which had been effected was of a total extent of 7762 sq. yards as claimed in the suit. However, according to the Second Respondent and the Trustees, the two plots of land were separate and distinct and in the guise of executing the decree, possession of the land admeasuring 2080 sq.yards had also been handed over.

4. The submissions of the parties came to be considered by the Executing Court in its judgment and order dated 13th June 1988. The Executing Court held that the subject matter of the agreement dated 1st November 1975 was open land admeasuring 7762.21 sq. yards. There was no reference therein to any structure standing thereon. As against this under the agreement dated 1st June 1969, by which a licence had been granted of land admeasuring 2080 sq. yards for the purposes of a school, certain structures had been constructed by the Society. In sum and substance, therefore, the finding that was recorded by the Executing Court was that the Petitioners were entitled to the execution of the decree only in respect of an area admeasuring

7762.21 sq.yards and not an area admeasuring 2080 sq.yards which formed the subject matter of the agreement of 1969. However, the Executing Court held that the entire decree was a nullity on the ground that only two of the initial Trustees of the Second Respondent continued to remain as Trustees by the time the decree was passed, the other Trustees having ceased to be Trustees either by retirement or death. On the ground that the new Trustees were not brought on record, the Executing Court held that the decree was a nullity.

5. Now, in so far as the school is concerned, it is an admitted position that it has ceased to function. It would appear from certain other proceedings which culminated in an order dated 1st October 1992 of a Division Bench of this Court in Writ Petition 1510 of 1985 that an administrator was appointed in respect of the school. The school itself, the Court is informed, has been closed. An affidavit has been filed in these proceedings on 15th October 2004 by the Petitioners stating that the school ceased to function about three years prior to the filing of the affidavit; that no students receive education therein and that there are no teachers or staff. It is stated that the only office bearer who represented the Second

Respondent, M.N. Kolwankar was illegally residing in a portion of the structure. Photographs have been placed on the record which show that the main structure is in a dilapidated condition and is completely abandoned.

6. In so far as the non-impleadment of the Trustees is concerned, a further affidavit has been filed in these proceedings on 13th December 2004 by Petitioner No.4. The deponent to that affidavit has stated that he has obtained a certified copy of the extract of the Register of Public Trusts, maintained under Schedule I and Rule 5 of the Bombay Public Trust Rules, 1951. A notarised copy thereof has been annexed to the affidavit. It is sought to be demonstrated therefrom that from the certified copy of Register, it is clear that the then Trustees were brought on record in accordance with the amendment carried out in the Register on 24th July 1984, vide C.R. No. 76/83 and order dated 4th June 1984. Consequently, it has been stated that those trustees were also brought on the record of the Suit in 1984 by the Petitioners by carrying out an appropriate amendment to the plaint. The next change of Trustees was made by change reports in 1987 and were brought on the public record in accordance with an

amendment carried out in the Register in 1989. Hence, it is submitted that the ex-parte decree passed on 2nd December 1986 was long before changes in the constitution of the Trustees were ordered. Hence, the names of the trustees which appeared in the title to the plaint were the correct names as on the date of the passing of the decree and were reflected in the record of the office of the Charity Commissioner. The contents of this affidavit have not been controverted.

7. There is no dispute about the fact that when the suit was initially instituted, all trustees who were then borne on the record of the Charity Commissioner were impleaded. The Executing Court proceeded on the basis that by the time the decree was passed in 1986, only two of the initial trustees remained, while the others had ceased to be trustees. However, the affidavit filed on behalf of the Petitioners on 13th December 2004 clarifies that the names of the trustees on the record of the suit accorded with the Register maintained by the Charity Commissioner under the Bombay Public Trusts Rules, 1951. This affidavit is not controverted nor is any submission to the contrary urged at the hearing. The suit was validly instituted and the trust and its estate

was duly and properly represented. It is impossible to hold that the decree which resulted was a nullity on the specious ground that certain changes have subsequently taken place in the constitution of a Trust. Unless those alleged changes were accepted by the Charity Commissioner and were reflected in the record maintained by the Charity Commissioner under the Rules, it cannot be said that the Plaintiffs were remiss in the obligation of impleading the current trustees. The finding that the decree is a nullity is, therefore, ex-facie erroneous and has to be interfered with and set aside.

8. The second issue raised in these proceedings relates to the finding of the Executing Court that the Petitioners were entitled to execution only in respect of the open plot of land admeasuring 7762.21 sq. yards as described in the agreement dated 1st November 1975. It is undisputed between the parties that the decree that was passed on 2nd December 1986 was in relation to this plot of land admeasuring 7762.21 sq.yards. Counsel appearing on behalf of the Petitioners has fairly stated that having regard to the decree of the Trial Court, the Petitioners would be entitled to the execution of the decree and to no more. This

position cannot be disputed. Therefore, even if the Executing Court is justified in coming to the conclusion that the land which formed the subject matter of the Leave and Licence agreement of 1969 was distinct from the land admeasuring 7762.21 sq. yards which formed the subject matter of the Lease Agreement of 1975, the Petitioners as decree holders, are entitled to possession of the land forming part of the subsequent agreement, namely, the land admeasuring 7762.21 sq. yards. The decree has to be executed as it stands. This question as to whether there has been any execution in excess of the decree can be duly taken care of by directing the Executing Court to cause a survey to be conducted by the DILR. The Executing Court shall thereupon determine as to whether the Petitioners received any land in excess of 7762.21 sq. yards. In the event that the Petitioners received any land in excess of 7762.21 sq. yds., a direction shall be issued over for the restoration of the excess, if any, to the Second Respondent represented by the present trustees.

9. In these circumstances, this petition can be disposed of and is accordingly disposed of in terms of the following directions :

-(i) The judgment of the Court of Small Causes dated 13th June 1988 in Misc. Notice 366 of 1988, in Misc. Notice 351 of 1988 in RAE&R Suit No.918/3356 of 1982 is set aside;

-(ii) The Executing Court shall cause a measurement to be carried out by the DILR of the total extent of land of which possession has been handed over to the Petitioners in execution of the decree dated 2nd December 1986. In pursuance of and under the decree, the Petitioners shall be entitled to a total extent of land admeasuring 7762.21 sq. yards forming the subject matter of the lease agreement dated 1st November 1975 and to no more. In the event that it is found that the land of which possession has been handed over to the Petitioners is in excess of 7762.21 sq. yards, the excess shall be restored, subject to verification and under the orders of the Executing Court, to the Second Respondent through the office of the Charity Commissioner;

-(iii) Parties shall appear before the Court of Small Causes for receiving directions on 17th July 2006. The entire exercise shall be completed within four months thereafter;

-(iv) The amount of Rs.1 lakh which was deposited by the Second Respondent and which was invested in pursuance of the interim direction dated 14th March 1997 passed in these proceedings shall be permitted to be withdrawn by the Petitioner together with accrued interest thereon.

10. Stay refused.

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